



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Report to the Legislature

Trust Water Rights Program

Publication #94-02

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P.O. Box 47600
Olympia, Washington 98504-7600

December 31, 1993



printed on recycled paper

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Executive Summary

The state's trust water rights program was established by 1991 legislation calling for the development of program guidelines and the testing of the trust water rights mechanism in a limited number of areas. A 1993 amendment to the statute expanded the program statewide. Guidelines were developed with the assistance of the Trust Water Rights Advisory Committee and additional public involvement.

Many requests for information have been made regarding the program, both from within and outside the state. Trust water rights are included in the water management recommendations in both the Methow and the Dungeness-Quilcene regional pilot planning efforts. Interest in the trust water rights program has also been expressed in several other locations, e.g., the Wenatchee River basin and Whatcom County. However, no trust water rights exist at this time. Generally, some obstacles exist to implementation, primarily related to data availability and funding. The program provides a mechanism for the creative reallocation of water which should prove useful for meeting current and future needs, especially as funding becomes available.

Introduction

The 1991 statute establishing the state's trust water rights program requires a report to the legislature at the end of 1993. This document describes the process of developing the program guidelines, the types of applications which have been discussed to date, and some potential issues. A section of this report addresses the means of using trust water rights on high priority salmon streams, as requested by 1993 legislation (Substitute House Bill 1309).

Chapter 90.42 RCW is the second of two state statutes establishing trust water rights authorities. The first, Chapter 90.38 RCW, was passed in 1989 and relates specifically to the Yakima river basin. A second bill in 1991 reformatted and expanded the trust water rights program to apply to the two regional pilot planning areas and up to eight Water Resources Inventory Areas statewide. A 1993 bill removed the requirement that the program apply to a limited number of areas, expanding it statewide.

The trust water rights program provides a mechanism for reallocation of water, either through a direct change in the purpose of use of an existing water right or the development and transfer of net water savings from water conservation and efficiency projects. Transfers to the trust water rights program may be either temporary or permanent; water rights in the program are not subject to relinquishment under Chapter 90.14 RCW. Net water savings, water which previously would have been forfeited by the water right holder following five years of non-use, can be moved to other beneficial uses, either instream or offstream, only through the trust water rights program.

Development of the Guidelines

RCW 90.42.050 requires that guidelines governing the acquisition, administration, and management of trust water rights be established by July 1, 1992. To satisfy this requirement, the Department convened a Trust Water Rights Advisory Committee to assist in developing these guidelines. Membership on the Committee was made up of representatives of the Water Resources Forum caucuses (state and local government, tribal government, business, agriculture, recreation, environmental interests, and fisheries) with the addition of the Bureau of Reclamation, the Washington State Water Resources Association, American Rivers, and the Northwest Power Planning Council.

Between February and May of 1992, this group met regularly to discuss issues and review draft documents provided by Ecology staff. Public comment was solicited through statewide workshops and presentations to the Water Resources Forum. A final version of the guidelines was sent to the Joint Select Committee on Water Resources Policy and formally adopted by Ecology in September 1992. The guidelines were distributed widely through a mailing list and have continued to be available upon request.

Applications of the Program ***Methow Regional Pilot Planning Area***

The discussions of trust water rights related to the Methow regional pilot plan have revolved around two possible applications of the program, a water bank to provide water supplies for future domestic development and to restore instream flows, and as a mechanism to restore instream flows on dewatered tributaries.

The planning group has proposed that irrigation rights be evaluated by Ecology for water availability, transferred to the trust water rights program, then tracked and distributed by the County as part of their building permitting processes. Ecology would issue a water right certificate and administer the water bank, with the County performing intermediate steps and interacting with the applicant. The water bank

could hold water both for future group domestic water supply and for restoration of instream flows. Tributaries to the mainstem Methow River have also been evaluated as part of the planning process. The trust water rights program could be applied to these streams, to convert water saved through efficiency improvements to trust water rights. The lack of available funding has proven to be one obstacle, as has a general lack of motivation to make a change in the status quo.

The Methow Valley Irrigation District has also been discussed as a candidate for trust water rights because of the potential reductions in diversions and improvements in efficiency which could be gained through system refurbishment. An agreement has been reached between the Department of Ecology and the Methow Valley Irrigation District that funding for system improvements will be provided in exchange for transfer of water savings to the trust water rights program.

The Dungeness-Quilcene Regional Pilot Planning Area

Trust water rights has been a topic of discussion by this planning group, also. One of the municipalities in the planning area has considered temporarily transferring some of its water right to the trust water rights program to augment instream flows. Agriculturalists have also proposed using the trust water rights program either to fallow and temporarily lease water to augment instream flows, or to transfer net water savings to the trust program.

Yakima Dry-Year Lease Option Program

The Bureau of Reclamation selected the Yakima river basin as the site for its water conservation demonstration project related to fisheries restoration in the Columbia and Snake river basins. The agency is pursuing a two-part project, including a re-regulating reservoir adjacent a critical reach of the Yakima river and the development of a protocol for acquiring and exercising dry year lease options to augment instream flows. The Bureau contracted with the Washington State Water Resources Association who in turn contracted with the Environmental Defense Fund (EDF) to facilitate this effort. A draft report has been produced which describes the process for acquiring dry year lease options, evaluating water availability and administering the program. The Bureau of Reclamation will be producing a final report. The dry year leases would be administered in part by the Department of Ecology through the trust water rights program.

Draft Memorandum of Understanding with Irrigation Districts

Irrigation districts are required to produce water conservation plans prior to obtaining funds from Referendum 38 for system rehabilitation. An element of these conservation plans is the identification of net water savings. Net water savings realized from these projects is transferable to the trust water rights program. The Department of Ecology has had discussions with irrigation districts regarding the transfer of water savings; a draft memorandum of intent is presently under consideration by two of the districts.

Other Requests for Information

Several other possible proposals for trust water rights or requests for information have been received by the Department. Many of these are listed below.

A member within the Methow Valley Irrigation District wants to transfer part of a water right to instream flow purposes through the trust water rights program.

Consultants for R.D. Merrill, new owners of the Early Winters project in the Methow valley, have discussed the use of trust water rights as part of their project.

The Bonneville Power Administration has expressed interest in using the trust water rights program for protection of fisheries flows.

The National Park Service requested information regarding the possible application of trust water rights on the Elwha River.

In the Yakima River basin, inquiries have been made from both irrigation districts and individuals located on tributaries regarding use of trust water rights program.

The Nooksack Indian Tribe has contacted the Department regarding the potential transfer of an irrigation right to instream flow purposes under the trust water rights program.

In the Nooksack River Basin, the trust water rights program is being discussed as a means of meeting current needs for irrigation and instream flows.

The trust water rights program was mentioned as an innovative strategy for water conservation in the Long's Peak report drafted by a group of academicians, water attorneys, and other experts to make recommendations on water policy to President Clinton's administration.

Problems Encountered

Lack of data –In most areas of the state, information on water rights and the validity of the water right and extent of use is lacking. Metering has not historically been required, so limited information is available regarding baseline water use. Over the short term, the statute should be amended to allow the installation of measuring devices in the early stages of trust water rights discussions (RCW 90.42.030(2)); over the long term, metering of all water use across the state should be required to establish baseline information.

Legal Issues Related to Water Rights –Clarification of the Department's authority to make tentative evaluations of water right claims and to enforce against improper water usage would be useful for implementation of the trust water rights program.

Funding availability –The funds initially available to the trust water rights program would come from Referendum 38; by law, these funds are disbursed as grants or loans to public entities and may not be granted or loaned to individuals or private companies. There is evidence of high potential for water savings through on-farm efficiency measures. A means of funding on-farm or private efficiency would increase the potential for trust water rights.

Chapter 90.42 RCW does not amend the Referendum 38 language regarding the purposes for which these funds are to be made available, but does explicitly state that water savings shall be transferred in exchange for state funds. The idea of transferring net water savings in exchange for receipt of state funds has been met with reluctance on the parts of some irrigation districts. The Department's position has been that if state funding provided to irrigation district efficiency improvements results in net water savings, then some or all of the saved water should be transferred to the trust water rights program.

Motivation –A basic tenet of the trust water rights program is the willingness of the water right holder to participate. In many instances, financial assistance provides the incentive. Another tenet of the trust water rights program is that water saved through efficiency and otherwise lost through relinquishment may be made use of through the trust water rights program. Water right holders do not generally understand that they lose their rights to water if beneficial use is discontinued.

Education – Widespread misunderstanding exists regarding beneficial use and water rights. Many water right holders do not understand that their water right is established by their beneficial use of water, which is not necessarily the same as the amount on the paper water right certificate or claim. There is no “right” to the amount not put to beneficial use as defined by law. Another misunderstanding is that saved water may not generally be put to use by the water right holder unless a transfer is made through the trust water rights program. Fear of making changes in the status quo and inadequate understanding of water law are stumbling blocks for the trust water rights program.

Future Steps

- Public outreach and education efforts to broaden public and agency awareness
- Identification of funding sources
- Cooperation with other state and federal agencies to incorporate trust water rights into their projects and funding
- Implementation of trust water rights in the regional pilot planning areas
- Clarification of legal issues: extent of Department’s authority to make tentative determinations of water rights and claims and to enforce use
- Simplification of process, protection of third parties

Recommendations for Substitute House Bill 1309 Priority Streams

A law passed during the 1993 legislative session, Substitute House Bill 1309, amended the trust water rights statutory requirement to report to the legislature. Section 13 of the bill asked the Department of Ecology to identify a statewide list of priorities for evaluation of instream flows to achieve wild salmonid production. Section 14 directed the Department to include as an element of this report methods of applying the trust water rights program to these high priority streams.

The Department has, in consultation with staff of the Departments of Fisheries and Wildlife and several Indian tribes, compiled a statewide list of priority streams for evaluation of instream flows for salmonid production. Streams in which water supply is a limiting factor to fisheries production are candidates for use of the trust water rights program to restore instream flows.

The following steps outline the approach of applying the trust water rights program to these high priority water-short streams:

- Focus on preventing future listings under the Endangered Species Act and on restoring stream flows for listed species.
- Coordinate with efforts by other federal or state agencies to purchase water or fund efficiency improvements for restoration of instream flows.

Determine funding mechanisms for local, state, federal and private entities.

- Focus on areas in which landowners are supportive of fisheries restoration or in which regional water management plans call for trust water rights or water conservation measures. Locally publicize programs related to restoration of fisheries and instream flows.

- If an instream flow regulation exists for the stream, analyze the relationship between the flows set on paper and the flows which occur.
- Identify critical reaches that need flow improvement and timing of when water is needed.
- Identify the existing patterns of water use, the extent of seasonal irrigation rights, availability of system storage, and the number and location of existing water rights and claims.

Identify the extent of exempt well development, hydraulic continuity, illegal uses, enforcement problems.

Determine availability of water use data from stream gauges, metering, other records.

- Juxtapose critical reaches with locations of water right holders to evaluate density of use and need for instream flow restoration. Density of use is a factor for protection and enforcement of trust water rights.
- Assess needs, determine how stream flows can best be improved, e.g., a change in diversion from surface to ground water, fallowing cropland, changing the purpose of use of an irrigation right on a temporary or permanent basis.
- Document the analysis of hydrologic information and data on water rights and water use in a report to be made available to local, state and federal agencies, tribes, irrigation districts, and other interested parties.

Conclusions

Two fundamental areas needing work are funding and public education. Clarification of the legal issues will also be important to successful program implementation. The trust water rights program is a new way of managing water and some time will be required for water right holders to become used to the ideas of transferring conserved water and reallocating existing water rights. The program has met with enthusiastic support in many areas of the state and among diverse interests and has tremendous potential for meeting needs for water.